UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

FLOWSERVE CORPORATION

and **Cases Nos. 22-CA-25250**
22-CA-25261
22-CA-25352

UNITED STEELWORKERS OF AMERICA, LOCAL 9404, AFL-CIO, CLC

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for the General Counsel.
***David Tykulsker, Esq.,* Montclair, NJ,**
for the Union.
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San Francisco, CA, for the Respondent.

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Based on charges and amended charges filed by United Steelworkers of America, Local 9404, AFL-CIO, CLC, (Union or Local 9404), a complaint was issued on October 30, 2002, against Flowserve Corporation (Respondent or Flowserve).[1]

The complaint alleges essentially that on May 15, 2002 during contract renewal negotiations, the Respondent unlawfully insisted, as a condition of reaching any collective-bargaining agreement (a) that the Union and certain of its members agree to refrain from filing lawsuits over the pension plan and withdraw all pending lawsuits over the pension plan and (b) that the Union agree to changes in the retiree medical plan. The complaint alleges that inasmuch as these changes are not mandatory subjects of bargaining and the Respondent bargained to impasse on them on May 15 in support of the above condition, it refused to bargain in violation of Section 8(a)(1) and (5) of the Act. The complaint further alleges that on about May 15, the unit employees engaged in an unfair labor practice strike, and that the Union made on their behalf an unconditional offer to return to work which was refused by the Respondent, which thereby engaged in an unlawful lockout of those employees.

The Respondent's answer denied the material allegations of the complaint and asserts as an affirmative defense that during bargaining it offered and maintained an active proposal containing only mandatory subjects of bargaining. On December 3, 16, and 17, 2002, a hearing

[1] The docket entries are as follows: The charge in Case No. 22-CA-25250 was filed by the Union on June 20, 2002, the charge and first amended charge in Case No. 22-CA-25261 were filed on June 26 and August 20, respectively, and the charge in Case No. 22-CA-25352 was filed on August 20.

was held before me in Newark, New Jersey.[2]

Upon the evidence presented in this proceeding[3] and my observation of the demeanor of the witnesses and after consideration of the briefs filed by all parties, I make the following:[4]

Findings of Fact

I. Jurisdiction

The Respondent, a corporation having its primary office and place of business in Irving, Texas and a facility in Phillipsburg, New Jersey, has been engaged in the manufacture of pumps for submarines and aircraft carriers. During the past 12 months, the Respondent derived gross revenues in excess of $500,000, and during the same period of time, purchased and received goods and materials in excess of $50,000 directly from suppliers located outside New Jersey. The Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The Respondent also admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. Background

Prior to the early 1990's, the facility at issue here in Phillipsburg, New Jersey was owned by Ingersoll-Rand Company. At that time it had a collective-bargaining agreement with United Steelworkers Local 5503, which is the predecessor to Local 9404, the Charging Party Union here. Thereafter, Ingersoll-Rand and Local 5503 entered into a series of collective-bargaining agreements. In the early 1990's, the facility was sold to Ingersoll-Dresser Pump Company, known as IDP. That company assumed the contract with the Union, and thereafter entered into a further agreement with the Union.

Flowserve acquired the facility from IDP in August, 2000 by its purchase of the shares of

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[2] Prior to the opening of the hearing, the Respondent filed with the Board a motion for summary judgment on the ground that the "undisputed facts … fail to constitute a violation of the Act." The motion was denied on the ground that it was not timely filed. The Respondent renewed its motion at the hearing and it is hereby disposed of by virtue of this Decision.

[3] The Respondent's unopposed motion to correct the transcript is granted. It has been received in evidence as Respondent's exhibit number 4.

[4] After briefs were filed, the Union moved to supplement its brief by including the citations of three cases, *Monroe Feed Store*, 112 NLRB 1336, 1337 (1955); *Pergament United Sales,* 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2nd Cir. 1990); *Johnstown America Corp*., JD-40-03, 2003 NLRB LEXIS 144 (April 4, 2003). The Respondent opposes the motion. The Board will permit parties in unfair labor practice cases to call to the Board's attention "pertinent and significant" authorities that come to a party's attention after the party's brief has been filed. *Reliant Energy a/k/a Etiwanda, LLC*, 339 NLRB No. 13 (2003). However, I reject the Union's argument made therein that additional violations must be found in that (a) the Respondent unlawfully sought to condition bargaining on the elimination of the 75/80 pension enhancement program and (b) unlawfully threatened plant closure. The complaint did not contain these allegations, and accordingly, the General Counsel, who determines the legal theory in an unfair labor practice case, has not embraced the Union's theory. *Sunland Construction* 311 NLRB 685, 706 (1993).

IDP, and thereby assumed all rights and obligations of the collective-bargaining agreement with the Union. That contract ran from January 1, 1997 to May 15, 2001. The admitted appropriate collective-bargaining unit is as follows:

> All production and maintenance employees, including truck drivers, employed by the Employer at its Phillipsburg, New Jersey plant, excluding supervisory employees, clerks, foremen, assistant foremen, guards, watchmen, timekeepers, first-aid workers, salaried employees and pattern checkers.

Shortly after Flowserve's acquisition of the facility there was a reduction in force. There had been 4000 employees working at the facility in 1975, but by the events at issue here there were only 23 active unit employees.

Four documents were entered into between the Respondent and the Union: (a) "Final Agreement" regarding the work force reduction, referred to as the "effects bargaining agreement" dated August 29, 2000 (b) Letter of agreement dated September 20, 2000 relating to seniority, bumping and work rules (c) Supplemental retiree medical benefits agreement dated December 8, 2000 and January 4, 2001 and (d) Letter of Understanding dated August 1, 2001 regarding retiree medical benefits.

The Supplemental retiree medical benefits agreement also provided that the collective-bargaining agreement would be extended to May 15, 2002.

B. Events Prior to the Bargaining

Ray Peters, the unit chairman of the Union, stated that in April, 2000, he first became aware that Flowserve was buying the facility. At that time, he received a document from Ingersoll-Rand, which stated that "Flowserve has agreed to establish a pension plan which will provide [the unit] employees with the same benefits that the Plan provides consistent with the obligations under the current collective-bargaining agreement."

On August 8, 2001, one year after the sale of the facility to the Respondent, the employees received a "draft" of a pension plan adopted by the Respondent and effective on August 8, 2001, referred to as B-11. The document contained modifications to the old pension plan, but retained the "75/80" pension language, which provided for an early, larger pension if the plant or a department closed.[5]

Prior to January, 2002, Peters was told by Michael Salamon, an attorney for the Respondent, that he (Peters) had the authority to resolve any outstanding issues, including a lawsuit that had been brought by the Union against the Respondent. Peters said that he did not have that authority.

On January 16, 2002,[6] Salamon sent a letter to Peters, urging him to reach agreement in the upcoming contract renewal negotiations, and stating that Peters had the authority to negotiate in behalf of the retired employees as well as the current workers with respect to

[5] "75/80" relates to eligibility to receive the early pension: in the event of a plant closing, an employee over age 55 must have enough years of service, when added to his age, to equal the number 75; workers under age 55 must have enough years of service to equal 80.

[6] All dates hereafter are in 2002 unless otherwise stated.

pension methodology and medical benefits for retirees. The letter concluded:

> I have seen too many plants closed where the senior members of the workforce negotiated to reserve some retirement benefit, demanded that it be locked in, and in so doing lock in a huge cost burden for the facility – a burden that no subsequent concession on the part of the active employees could mitigate.

On February 22, Harvey Geib, the chief negotiator for the Respondent, while visiting the facility to speak about certain pending grievances, met with Peters and Union bargaining committee members Manuel Mirailh, and Nick Fitzco.They spoke about bargaining procedure. Peters testified that Geib took the current contract, held it over a garbage can and said that he was going to throw it in the garbage, completely change the contract, and create a whole new agreement. Geib admitted being present at the site at that time, but denied saying that he was going to throw the contract in the garbage can. Neither Mirailh nor Fitzco testified.

Geib testified that the expiring collective-bargaining agreement was "cumbersome" and costly, having been in effect when there were thousands of employees. He sought to "streamline" the agreement and reduce or eliminate the costly items. Specifically, the Respondent's goals were to (a) eliminate the 75/80 pension enhancement (b) eliminate the no-subcontracting clause and (c) modify the retiree medical plan toward which the retiree contributes no money, and which costs the company $600,000 per year. Geib stated that if the Respondent could not obtain modifications to these costly items, it would seek a reduction or pay-back through wage concessions from the current 23 unit members.

The Union's strategy was to avoid an economic strike "at all costs" because it believed that a strike of 23 workers would not have an impact on the Respondent's operations.

C. The Lawsuit

In February, 2002, the Union and Peters filed a Section 301 lawsuit in U.S. District Court against Flowserve and Ingersoll-Dresser and their respective pension plans. The suit alleges that the 1980 pension agreement was applicable to the employees, and that the defendants violated that agreement and collective-bargaining agreements by applying a different definition of pensionable wages, and by not granting service credits for layoff as agreed, and by failing to apply the correct provisions of those agreements. It was alleged that the defendants' actions failed to afford Peters the pension benefits to which he is entitled. The suit seeks to compel arbitration to determine whether the 1980 pension agreement is currently binding on the parties regarding pensionable wages and credited services for pensions, and to clarify Peters' future rights to pension benefits.

D. The Negotiation Sessions

Negotiations were held from April 30 through September 26. The Respondent was represented by Geib, its labor relations manager and chief negotiator. The Union's negotiators were Peters, Mirailh who was the Union International's representative, and Fitzco, the local union's secretary.[7] The parties met for seven bargaining sessions until the ratification vote on May 16, and nine sessions thereafter.

[7] There was some question, which need not be resolved, as to whether the chief spokesman for the Union was Peters or Miralh.

1. April 30

At the April 30 negotiation session, the Respondent presented a written proposal. It provided, inter alia, for a modification to the retiree medical benefit plan, and other changes. The proposal did not contain a wage offer or a proposal concerning the 75/80 pension language. The Union submitted a list of 34 items it wanted changed, including a "substantial" wage increase and no change in the 75/80 pension plan.

Mirailh told the Respondent that "the lawsuits should not be included. This is the current employees' contract and no one else's," adding that he wanted to focus on the 23 active employees. Geib said that when he "passes the company's proposal it will be in the form of a contract. Flowserve has a prototype contract that is used at all companies. .. everything in it is negotiable and …. is patterned after their (union's) current contract. Some things are included, some are not."

2. May 6-9

On May 6, the parties discussed the Respondent's proposal in detail. There was no discussion of the 75/80 pension plan, retiree medical benefits or wages. Union agent Peters stated that the Union probably asked why the 75/80 pension language, present in the expiring contract, was not in the Respondent's proposal. Brian Bohunicky, the plant manager, said that the costs were too high, there was no flexibility in the plan, and that it was "counterproductive" to its business.

On May 8, the Respondent distributed a copy of "Plan B-7", its proposed pension language. The parties spoke about the possibility of a strike. The last strike, nine years earlier, lasted 17 weeks. Geib mentioned that a strike over this contract "would be a lot longer." Mirailh said that the Union did not want to strike. They discussed the Union's proposal. In speaking about the Union's demands, Geib said that a majority of them were too costly, a few of the Union's proposals were already in the Respondent's proposal, and others were held in abeyance. Geib estimated that the Union's proposals would result in an expense of $9.6 million.

On May 9, the Respondent submitted its second written contract proposal.[8] The proposal sought to modify Article 16, insurance and pensions (as defined in the Insurance Appendix in the contract), by changing the retiree medical benefits plan by enrolling the retirees in the Respondent's Flowserve Flex Medical and Dental Plan, in which those enrolled make contributions toward their medical insurance. Under the expiring contract, the retirees did not have to contribute any money toward this coverage, and the coverage was generous – providing for 100% hospital coverage for 365 days; 100% reasonable and customary surgical coverage; and major medical coverage including 100% coverage after reaching annual deductible.

The Respondent's proposal did not contain a wage proposal or language relating to the 75/80 pension plan. The parties discussed retiree medical benefits, set forth above, and also they spoke about "Letter M." That document, an addendum to the expiring contract, is dated October 16, 1980 and states as follows:

> It is understood by the parties that any retired employee receiving

[8] The parties discussed holidays, personal days, and a temporary work assignment plan. Geib told the Union that the Respondent would consider a severance pay plan and a vision plan.

> benefits, or any person receiving surviving spouse benefits, as provided by the Agreement, shall not have such existing benefits terminated or reduced, regardless of the existence, or lack thereof, of the Labor Agreement, unless such reduction or termination is mutually agreed upon by the Company and the Union.

Peters stated that the Union made it "perfectly clear", throughout the negotiations, that it did not want to speak about retiree medical benefits. During a caucus at the May 9 session, Mirailh called the Union International office which directed that retiree medical benefits had to "stay off the table – there was no way we could remove Letter M from the contract." Mirailh told this to the company negotiators.

3. May 14

Geib presented to the Union's negotiators certain news articles concerning the rising cost of medical insurance and efforts by other companies to pass on part of that cost to employees.

Plan B-7, the proposed pension plan, contained language concerning the 75/80 program, which Geib said was erroneously included, and would be omitted from the Respondent's proposal.

The parties agreed to certain issues including four floating holidays; distribution of overtime, the number of shop stewards; the number of hours of training for non-unit employees; the purging of disciplinary records; the selection of one arbitrator instead of three; time limits for filing grievances; and posting of awarded jobs.

Mirailh repeated that the Union would not discuss the retiree medical plan or the 75/80 pension plan. Geib told him that if he did not want to discuss the retiree medical plan or 75/80, both of which are costly items, he would prepare an alternate proposal that would attempt to save money for the Respondent in other areas, including wage concessions from the current employees. Geib testified that at the end of this session, he was trying to learn if the Union was willing to bargain about modifying the retiree medical plan and eliminating the 75/80 provision. He stated that if the Union was willing to speak about these issues, he would offer a modest wage increase, and if not, he would propose a wage reduction for the current employees to cover the cost of those costly items. He predicted that the latter proposal would be "ugly" and may be "unacceptable" to the Union.

4. May 15

This was the day that the contract was due to expire. The parties met at 9:00 a.m. They spoke about the 75/80 plan and the Respondent requested that the Union agree to eliminate the Letter M provision and enroll the retirees in the Flowserve Flex Plan. Geib said that the retiree medical plan was a high cost item and that either the retirees or the active employees would have to pay for the retirees' medical insurance.

Geib orally presented two proposals referred to as Alternative A and Alternative B.[9] He

[9] In their testimony, Geib and Peters often interchanged the two proposals, misidentifying them as "A" or "B". For the sake of consistency, I will refer to the two Alternatives as they were

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said that if the Union was willing to bargain about the modification of retiree medical benefits and the elimination of the 75/80 pension plan, Alternative A would include an offer of a wage increase. If, however, the Union did not agree to those changes, Alternative B would provide for the retention of those benefits, but the active employees would have to take wage concessions of 15% the first year, an additional 15% the second year, and 10% the third year. Both alternatives would include the items already agreed upon.

Geib testified that the wage reductions were computed based upon an anticipated recouping of some of the costs from the retention of the retiree medical benefits and 75/80 pension plan, but he realized that even the proposed reductions in wages would not result in a sufficient recoupment of the retiree medical cost. Nevertheless, he did not want to reduce the wages drastically since he wished to achieve agreement on a renewal contract.

The Union said that Alternative B which includes a wage decrease, was unacceptable, adding that it did not want to speak about a wage reduction. Following a caucus by the Union, Mirailh then said "let's talk about retiree medical." Geib stated that that comment "shocked" him because of the Union's unwillingness to talk about that issue for 1½ days. The Union then suggested that the retirees could pay $40 per month toward their medical plan as they had in the past. Geib said that such a payment was not enough. Peters asked if the Respondent was willing to offer a severance package in return for the elimination of the 75/80 pension enhancement. Geib said he could "take a look at it."

According to Geib, Mirailh asked hypothetically, if the Union accepted a modification of retiree medical benefits and the elimination of the 75/80 pension enhancement, what offer would be made. Geib asked if B-7, the Respondent's pension plan proposal, would be part of the package. They then discussed B-7 and Peters spoke about the pending lawsuit concerning the Ingersoll-Rand pension plan variation and B-11, the current pension plan. Geib said that there appears to be a conflict if the Union accepted the B-7 pension plan with a lawsuit pending on the B-11 plan. "It seems like they're in conflict, you can't have two plans." There was further discussion of B-7 and the lawsuit. For example, Geib learned that the pensionable wages which affected the current employees pursuant to the change in the pension plan amounted to $500 per current employee. He told Peters that the Respondent would offer $1000 per worker "just to sign out of the suit." Peters replied that he did not believe that he could withdraw the suit. Geib testified that Mirailh told Peters that he could do so, and later asked for more time to look into that issue. Geib testified that he did not condition his offer of B-7 upon the withdrawal of the lawsuit, and in any event, Peters did not specifically say that he was willing to withdraw the suit.

Geib further testified that he asked Mirailh whether he was willing to bargain over the modification of the retiree medical benefits, and loss of 75/80. Mirailh said that he was willing to bargain over those matters. Geib stated that for the remainder of the day the discussion related to Alternative A which included a wage increase.[10]

According to Peters, at about 8:00 p.m., the Union sought to continue bargaining that

written by the Respondent in G.C. Exhibit 10, with Alternative A including a wage increase and Alternative B including a reduction in wages.

[10] The Respondent's bargaining notes quote Geib: "If you are saying you accept the loss of 75/80, retiree medical, etc., there are funds available for your people. If you're willing to say that, I can reevaluate. Mirailh responded: "What you give me, I'll take to membership." Later, Geib asked Mirailh, whether "in order to move on are you now saying you can accept the loss of 75/80, retiree medical …." Mirailh said "yes."

evening until a contract was reached. Mirailh suggested to Geib that they agree to a 60 day extension of the contract while the employees continued working during the bargaining. Peters stated that Geib replied that Flowserve "does not give extensions."

Geib testified that Mirailh wanted to continue negotiations the next day. Geib did not understand him to mean that he wanted to continue negotiations past the contract's expiration, with the employees continuing to work. He denied telling Mirailh that he was unwilling to bargain the following day. He replied that there was "plenty of time tonight. Let's take a dinner break and continue." Mirailh asked that they not "nickel and dime" each other, expressing a preference to "get this done." He told Geib to give him his best offer which included a wage raise, and he would take it to the employees.[11]

The parties then took a dinner break at 10:00 p.m., and when they returned Peters noted that the Respondent's representatives had removed all of its materials from the table. Geib then distributed a written document which he called the Respondent's "best and final" offer. It included changes in the retiree medical plan and in the 75/80 pension enhancement. Geib's definition of a "last and best offer" is that it was a complete, final package ready to take to the membership for a vote. Geib told the Union agents "I told you that I would let you know when it was my last best and final offer, this is it."

Specifically, the offer included, inter alia, wage raises of 3% in each year of the three year contract, improvements in vacation, 11 holidays, two personal days, and a no-cost vision plan. The document also contained the following: "In consideration for this best and final offer, the Union must accept without modification: the attached Union Contract." Despite that language, Geib testified that the Union could have offered a modification to the contract. Indeed, he stated that he offered a modification immediately thereafter, which was the offer of a signing bonus of $1500 per employee if the Union committee recommended acceptance of the proposal. A comprehensive collective-bargaining agreement was attached. The document also included a four paragraph statement of "settlement and release" which was to be signed by Peters and four other workers who apparently were the only ones affected by the pensionable wage part of Plan B-7. The statement set forth that each agreed to accept a payment of $1,000. This refers to Geib's offer earlier that evening that the Respondent would pay each employee $1000 "just to sign out of the suit." The statement also provided:

> 1. I recognize that the Pension Plan B-7 (as modified and approved May 15, 2002, is the sole and exclusive document governing the pension for all current bargaining unit members represented by Local 9404.
>
> 2. I, on behalf of myself and USWA Local 9404 agree to dismiss with prejudice the matter captioned United Steelworkers, et al v. Flowserve Corp., et al, Civil Action No. 02-0765, to the extent I, and USWA Local 9404 are plaintiffs.
>
> 3. I, myself, and on behalf of my heirs, administrators, assigns, and agents, release and discharge Flowserve Corporation, present and former directors, officers, agents and employees,

[11] Mirailh's alleged request for the Respondent's "best offer" was not mentioned in Geib's pre-trial affidavit or in the Respondent's notes of the bargaining session. Nevertheless, I credit Geib's account inasmuch as Mirailh did not testify.

from any claims, causes of action, suits, damages, rights to monetary or equitable relief, known or unknown for anything up to and including the date on which I sign this Settlement and Release relating to or arising from the Pension Plan B-7, the negotiation of Pension Plan B-7, the modifications approved on May 15, 2002.

4. For this Settlement and Release to be valid and binding, each of the following: Richard Vitko, Howard Kuhns, Frank Turdo and Charles Hawk must each execute a parallel agreement.

_____
Mr. Ray Peters

In an e-mail sent on May 28 from Salamon to the Union's attorney, he explained that, following the Union's raising the issue of the pension at the bargaining table, Geib said that it was "unwise to build a castle on sand, i.e., he was uncomfortable bargaining on provisions when there was pending litigation arising from a long standing dispute regarding the underlying pension plan." Salamon also stated that in attempting to resolve the pension issue, the Respondent offered to modify the 24-month aggregate absence provision regarding layoff and make a payment to the five affected current employees, adding that "as a condition, Flowserve did seek a release from these five employees."

Geib further testified that the litigation was discussed as a "cleanup item" in terms of whether a withdrawal of the suit should be part of the final proposal. He stated that his only concern was whether the suit would affect the 23 current employees, and whether B-7, the proposed pension plan was "inconsistent" with the suit. He told the Union "you can't accept B7 going forward and keep the 1980 pension plan. That's all I said."

It is undisputed that the parties then spoke about the employees conducting a ratification vote on this package. There is some dispute as to who suggested a vote, with each party attributing the first mention of a vote to the other, but according to Peters, when the Respondent gave the Union its written offer "the Union started talking about the mechanics of how the employees would vote on that."

Geib then said that if the Union's bargaining committee recommended approval of the offer the Respondent would add an additional $1500 per employee as a signing bonus. Mirailh said that he would recommend it to the workers. It should be noted that although the Union initially said that any changes to the retiree medical plan and 75/80 pension enhancement was unacceptable, the Union at this point said that it would recommend that these changes be accepted. It was agreed that the employees could work the following morning and then would be dismissed from work to vote at the Union hall.

Geib testified that Mirailh asked what would happen if the contract was rejected. Geib replied that he assumed that the Union would be on strike, but "let me know what you're doing." The Respondent's representatives then shook hands with the Union's agents, told them "thanks for being professional, thanks for being gentlemen" and left. Peters testified that at the conclusion of the session he and Fitzco were in "shock". They thought that "something was going to happen … with the five outstanding issues – that we'd get half and the company would take the other half, and there'd be … wage proposal there, and everybody would walk away the winner. But that didn't happen and it kind of shocked us."

Geib stated that when negotiations concluded on May 15, Alternatives A and B were still outstanding. Alternative B which provided for the retention of retiree medical benefits and the 75/80 plan, and a wage decrease, did not include a provision that the lawsuit be withdrawn or for employees to sign a release. He stated, however, that he did not give the Union a best and final offer on Alternative B that evening because Mirailh asked for a best offer which included a wage increase.

E. The Ratification Vote and Subsequent Events

On May 16, a meeting was held at the Union office. The employees asked whether the subcontracting clause and the 75/80 pension enhancement program were included in the proposed contract. When they were told that those provisions had been eliminated from the contract, they reacted angrily, throwing the proposal on the floor and stepping on it. They voted, 20 to 3, to reject the proposed contract. Mirailh stated that he phoned Geib with the results, and was told that the employees had 30 minutes to return to the plant and remove their tools. Peters testified that he told Geib that the workers did not want to strike, and asked to continue negotiations while the employees worked. Geib replied that he had other contracts to negotiate and would not be able to meet for four weeks.

Geib testified that after being told that the contract was rejected basically because of the removal of the subcontracting and 75/80 provisions, Mirailh asked that the employees be permitted to retrieve their tools. From this, Geib assumed that the Union was on strike. When Geib met Mirailh at the plant, they discussed continuing the negotiations. Mirailh told Geib that he was not available to meet until May 24, and would be unavailable for the month of June but would try to make some dates available. Geib denied being asked whether the workers could continue working, and he denied telling the Union that the employees could not work on May 16 or 17.

F. The Offers to Return to Work

The employees obtained picket signs at the Union hall which had been prepared the previous day, and began picketing.

On May 17, Peters told plant manager Bohunicky that the employees wanted to work. Bohunicky told him to put it in writing. That day, Peters sent the following letter to Bohunicky:

> Local 9404 still strongly feels, as discussed at the bargaining table and again at the guard shack (main entrance) today, we should be at the plant doing our own work while negotiations proceed. Therefore we as a union are asking again for a sixty-day extension to our current contract, to resolve our issues. Please respond in writing.

On May 24, Geib replied as follows:

> Like Local 9404, Flowserve is willing to pursue continuing negotiations. However, the proposal contained in your letter of May 17, 2002 is not the 'unconditional offer to return to work under the terms of the expired CBA' that striking unions make to assert the end of a strike and a willingness to return to employment. Your offer contains a specific condition. If the Union is willing to make an unconditional offer to return to work under the terms of the

expired CBA, Flowserve will respond promptly.

On June 13, the Respondent's attorney Michael Salamon sent a letter to Peters which stated that Flowserve invited the Union to make an unconditional offer to return to work and it had not replied. He also noted that immediately before the strike, the Union rejected the Respondent's "last best and final offer."

After being told that the improper "condition" in his letter was the request for a 60 day extension to the contract, on June 18, Peters sent the following letter to the Respondent: "U.W.W.A. Local 9404 on behalf of its members, hereby unconditionally offers to return to work immediately." On the same day, Mirailh sent a letter to Geib requesting continued negations and asking for available dates for bargaining.

On June 21, Geib sent the following letter to Peters:

> Because it was sent by facsimile after business hours, Flowserve was first able to review your letter dated June 18, 2002 (containing the Union's unconditional offer to return to work), on June 19. Since that time, Flowserve has evaluated present business conditions, the negotiation process, the Union's subsequent conduct, the distance between the Union's position and Flowserve's positions, and most importantly, the necessity to meet the needs of our customers, including the Department of Defense.
>
> At the present time, Flowserve respectfully declines the Union's offer. Flowserve understands the labor law implications of this action, and hopes that the Union will vigorously pursue the commitment to reopen negotiations that is tacitly contained in the offer to return to work. Flowserve is presently trying to contact Mr. Mirailh and schedule renewed negotiation sessions.

Geib testified that the Respondent's June 21 letter constituted a lockout of the employees. He stated that he declined the Union's offer to return to work because he wanted to return to the bargaining table and achieve a contract. He believed that the Union would have a greater incentive to bargain if the employees were not working.

On June 24, Geib wrote to Mirailh, setting forth various dates that he was available for negotiations, and asking him to respond. Thereafter, bargaining dates were agreed upon.

G. Subsequent Negotiation Sessions

Eight bargaining sessions were held thereafter, from July 1 through September 26. Agreement was reached on certain matters, including the 24-month service credit for layoffs relating to the retiree pension plan, two-hour call in requirement, and eligibility for holiday pay. At the bargaining session on July 19, Geib told the Union that Alternatives A and B were still available. At the session of July 30, the Respondent agreed to extend the amount of time an employee could be laid off without affective his service credits for pension purposes.

On August 13,[12] the Respondent modified its Alternatives A and B proposals, and

[12] There was disagreement as to whether these events occurred on July 31 or August 13. I

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presented them in writing. Alternative A offered the employees a 3% wage increase in each of the three years of the contract. It also provided that the Union shall (a) accept Pension Plan B-7 (b) accept the elimination of the 75/80 early retirement enhancement (c) accept the elimination of Letter M (d) accept the company proposals on current retiree medical benefits and subcontracting and (e) withdraw with prejudice all pending lawsuits, grievances and claims on behalf of current employees regarding pensions, subcontracting, and the retiree medical plan. The proposal also required that the Union and Peters recognize that B-7 is the correct applicable pension plan, thereby waiving any claims under ERISA or the NLRA, based on the provisions of any other pension plan, regarding the calculation of pensionable earnings, service credits for layoffs, or any other item. It further provided for a one-time payment to current unit employees of 16 weeks of their base wage provided, inter alia, that they accept or reject this offer within 30 days of the ratification of the new contract. The acceptance of such payment was conditioned upon those employees making a voluntary resignation and signing a Settlement and Release, and assisting in the "transition of his duties or the training of his replacement, if necessary, by continuing his employment for a period not to exceed 90 days."

Alternative B proposed that the employees' wages be reduced by 15%, 15% and 10% in each of the three years of the contract. It also required that the Union accept (a) all provisions of the company's proposal previously accepted by the Union and those items "left open" (b) the company's proposal on subcontracting (c) the elimination of Letter M (d) Plan B-7 as the applicable pension plan and (e) the elimination of the 75/80 early retirement enhancement.

Geib testified that Alternatives A and B presented on August 13 were not the same as those offered on May 15. He stated that the Alternative A proposal presented on August 13 did not include a $1500 signing bonus, and that Alternative B differed on August 13 in that it proposed the elimination of 75/80, whereas Alternative B offered on May 15 did not propose the elimination of 75/80. Geib conceded that from the Union's perspective, both Alternatives presented on August 13 were worse than the ones offered on May 15.

On August 19, Geib wrote to Mirailh, summarizing the status of the negotiations. He stated that the employees are locked out, and outlined the five outstanding issues: medical benefits for active employees; subcontracting; Letter M; 75/80; wages. As to Letter M, the letter states:

> Letter M, although an attachment to the collective bargaining agreement from 1980, purports to exist without respect to the CBA, and attempts prevents [sic] the employer from amending the "existing" retiree medical benefits without Union approval. Does this document act as a contract in the absence of a CBA? Flowserve is uncertain. What was the consideration offered by the Union in exchange for this commitment? Flowserve is uncertain. Does this convert a permissive subject to a mandatory subject? Flowserve is uncertain.
>
> Flowserve is certain that it needs flexibility to amend retiree medical benefits for future retirees. Letter M must be rendered null and void.

In the September 10 bargaining session, the Union agreed to modify its position concerning medical benefits for current employees, and in return the Respondent agreed to

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find that, consistent with the Respondent's detailed notes, they occurred on August 13.

modify Alternative B so that the reduction in wages would be 15%, 10% and 5%. Mirailh told Geib that Letter M "is a subject we can't move on." Geib replied that the parties were at impasse on that matter and also on subcontracting, which the Union refused to eliminate from the contract.

At the last bargaining session on September 26, the outstanding issues were (a) Letter M (b) pension (c) wages and (d) subcontracting. Mirailh told Geib that the Union was "adamant on two issues: Letter M and 75/80," but he would speak about subcontracting. Geib repeated that the company "must have Letter M and 75/80 out of the contract." The Union refused to talk about Letter M.

Geib testified that currently the parties are not at impasse since each time the parties met there was movement in their bargaining positions. He conceded, however, that the Respondent's position has not changed concerning retiree medical benefits. Further, there has been no movement in the parties' positions on subcontracting. The Respondent has not implemented any of its proposals. The locked out employees have not been replaced. Their work is being performed by management personnel.

III. Analysis and Discussion

A. The Alleged Insistence to Impasse on Nonmandatory Subjects of Bargaining

The complaint alleges that the Respondent violated the Act by insisting to impasse on two nonmandatory subjects of bargaining – that the Union and its members agree to changes in the retiree medical plan, and refrain from filing lawsuits over the pension plan and that the Union.

The Respondent argues that, at all material times, it had two alternative sets of proposals on the bargaining table, only one of which, Alternative A, contained allegedly nonmandatory subjects of bargaining. It asserts that the Union could have accepted Alternative B, which contained only mandatory subjects. The Respondent further asserts that inasmuch as the Union recommended Alternative A to its members, it cannot be claimed that the Union expressly rejected those proposals or that the Respondent unlawfully insisted on those terms.

A party to negotiations violates the Act by insisting on a nonmandatory subject of bargaining as a condition precedent to entering an agreement. *NLRB v. Borg-Warner Corp*., 356 U.S. 342, 349 (1958); *Latrobe Steel Co. v. NLRB*, 630 F.2nd 171,179 (3rd Cir. 1980). A respondent is entitled to initially make proposals concerning nonmandatory subjects, but cannot "continue to insist upon acceptance of the proposal to the point of impasse 'in the face of a clear and express refusal by the union to bargain about the nonmandatory subject.'" *Pleasantview Nursing Home*, 335 NLRB No. 77, slip op. at 4 (2001) citing *Union Carbide Corp*., 165 NLRB 254, 255 (1967). The first question therefore becomes whether either of the two proposals are nonmandatory subjects of bargaining.

In *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co*., 404 U.S. 157 (1971), the Supreme Court held that pensioners are not employees under the Act, and that matters involving them do not "vitally affect the terms and conditions of employment of active employees." 404 U.S. at 176. The Court held that the parties were not required to bargain regarding retirees' health benefits, as it was a permissive or nonmandatory subject. 404 U.S. at 188-189. Accordingly, as applied here, the issue of retiree medical benefits was a nonmandatory subject as to which the Respondent could not insist to impasse.

Similarly, I find that the Respondent's a proposal concerning the withdrawal of the pension lawsuit is also a nonmandatory subject of bargaining as to which the Respondent could not insist to impasse. *Plattdeutsche Park Restaurant*, 296 NLRB 133, 137 (1989); *Stackpole Components Co.,* 232 NLRB 723, 732.

The principal question therefore is whether the Respondent insisted on either of the two proposals as a condition precedent to entering an agreement or whether the Respondent has insisted to impasse on the nonmandatory subjects of bargaining.

The parties bargained during seven sessions including the meeting of May 15, the date of the alleged violations. During those sessions, the Respondent and the Union were firm in their positions regarding retiree medical benefits. The Respondent sought to modify those benefits in order to reduce its costs and the Union did not want to discuss it.

On May 14, the Respondent informed the Union that if it continued to be unwilling to discuss retiree medical benefits it would make a proposal which would include wage concessions, but that if the Union wished to discuss that issue, the Respondent was prepared to offer a wage raise. The following day, the day the contract was to expire, the Respondent presented both proposals to the Union.

The Union rejected the Respondent's offer of Alternative B, a wage reduction and the retention of retiree medical benefits.[13] The Union then agreed to "talk about retiree medical" and suggested that retirees pay $40 per month toward their medical plan. Later, the Union agent said that he was willing to bargain over retiree medical benefits, and finally told Geib to give the Union his "best offer" which included a wage raise and he would take it to the workers. At the end of the session, the Respondent presented Alternative A, its last and best offer which included a wage raise and a modification of the retiree medical benefits. Union agent Mirailh said that he would recommend this proposal to the membership.

That proposal voted on by the employees also contained a requirement that the five affected employees agree to withdraw the lawsuit over the pension plan. This provision resulted from a discussion on May 15 in which the parties spoke about the Union accepting the Respondent's proposal of a pension plan to replace the old one. There was movement in the Respondent's position regarding the pension plan, During that discussion, the Respondent offered to modify the 24-month service credit provision, which was, according to Peters, "fairly important" to it, and was one of the issues in the lawsuit. Also, based on the credited testimony of Geib, Mirailh suggested to Peters that the Union could withdraw its lawsuit and asked for more time to explore that possibility.[14]

I find that based on all the facts in this case, the Respondent did not insist on either of the two proposals as a condition precedent to entering an agreement, and did not insist to impasse on the nonmandatory subjects of bargaining.

"An impasse occurs whenever negotiations reach that point at which the parties have

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[13] Regressive bargaining is not per se unlawful. *Telescope Casual Furniture, Inc*., 326 NLRB 588, 589 (1998).

[14] In this connection I recognize that Peters quoted Mirailh early in the negotiations as saying that the lawsuit should not be a part of these negotiations. However, I find that at the end of the negotiations on May 15, Mirailh's attitude changed and he expressed a willingness to conclude the negotiations and accordingly modified his position concerning the lawsuit issue.

exhausted the prospects of concluding an agreement and further discussions would be fruitless." *Walnut Creek Honda*, 316 NLRB 139, 141 (1995). The Board in *Taft Broadcasting* Co., 163 NLRB 475, 478 (1967) stated:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

I cannot find that an impasse occurred. On May 15, the Respondent altered its bargaining position, moving from its initial position demanding the modification of retiree medical benefits to a position in Alternative B where it agreed to leave those benefits intact. Thus, it cannot be said that the Respondent insisted to impasse on this issue. It changed its position, offering the Union an alternative which left retiree medical benefits intact. The Union could have accepted Alternative B and kept retiree medical benefits unimpaired, but it chose not to. Alternative B did not include the provision concerning the withdrawal of the pension lawsuit. Thus, by accepting Alternative B, the Union could have maintained its position that the lawsuit go forward. The use of an alternative proposal to pressure a union to agree to the primary proposal is not unlawful. *Telescope Casual Furniture, Inc.,* 326 NLRB 588, 589 (1998).[15]

In making this finding, I recognize that Geib said that all of his proposals would be in writing and in the form of a contract, and that Alternative B was orally presented. This however, does not make the presentation of Alternative B any less valid or meaningful. On May 15, both alternatives were presented orally, and the Union could have accepted Alternative B. The fact that it was not presented in writing at that time was due to the Union's refusal to consider it. After the dinner break the Respondent presented its written offer of Alternative A, which was the only alternative proposal the Union was willing to consider.

The Union argues that there was no discussion of Alternative B at the first five bargaining sessions following the strike vote, with Alternative B being discussed for the first time at the August 13 session. However, rather than showing that Alternative B was never considered an alternative proposal by the parties, this fact demonstrates that the Union continued to be unalterably opposed to Alternative B with its wage reduction terms.

In addition, it cannot be said that the Union clearly and expressly refused to bargain about the two proposals on the critical date of May 15. *Union Carbide,* above. Although the Union did express its opposition to bargaining about retiree medical benefits prior to May 15, on that date Union agent Mirailh agreed to recommend the proposal to the employees. The Union contends that it was "shocked" at the conclusion of events that evening. I acknowledge that in the late evening of May 15 the Union sought to continue bargaining the following day but the Respondent urged it to proceed. However, following the last Union caucus that evening when the Respondent gave the Union its written offer, according to Peters, "the Union started talking about the mechanics of how the employees would vote on that." Clearly, as testified by Geib,

[15] *Greensburg Coca-Cola Bottling Co*., 311 NLRB 1022, 1028 (1993), cited by the Union, is inapposite. In that case, the union "repeatedly expressed its opposition to the nonmandatory subject, and the employer continued to insist on the proposal. Here, the Union rejected an alternative proposal containing no nonmandatory subjects.

Mirailh was anxious to conclude the bargaining and accordingly agreed to recommend the Respondent's proposed agreement to the unit workers. Based on the above, I cannot find that the Union expressly refused to bargain about the two proposals.

Following May 15, nine bargaining sessions were held during which agreement has been reached on certain terms. Although it is true that no agreement has been reached on other major items, there is no reason to believe that further negotiations would be futile.

B. The Strike and Lockout

The complaint alleges that on May 15, the employees engaged in an unfair labor practice strike, and that the Union made on their behalf an unconditional offer to return to work which was refused by the Respondent, thereby unlawfully locking out those employees.

Inasmuch as I have found that the Respondent engaged in no unfair labor practices by allegedly insisting to impasse on nonmandatory subjects of bargaining, I cannot find that the strike which resulted from the rejection of the contract was caused by the alleged unfair labor practices of the Respondent.

It should also be noted that even assuming that the Respondent engaged in unfair labor practices as alleged, there is no nexus between those alleged violations and the strike. Thus, the reason for the strike apparently was the failure of the proposed contract to include provisions for 75/80 pension enhancement and subcontracting. Upon learning that the contract contained neither term, the employees immediately voted to reject it and to strike. There was no evidence that the retiree medical benefits or withdrawal of the lawsuit was mentioned at the strike vote meeting.

"It has been settled law for over 35 years that an employer does not violate the Act by locking out its bargaining unit employees temporarily for the sole purpose of pressuring them to accept its bargaining proposals." *Tidewater Construction Corp*., 333 NLRB 1264 (2001) citing *American Ship Building Co. v. NLRB,* 380 U.S. 300 (1965). Both pre-impasse and post-impasse lockouts are thus permissible. *Darling & Co*., 171 NLRB 801 (1968); *Harter Equipment Co*., 280 NLRB 597 (1986).

On June 18, the Union made an unconditional offer on behalf of the striking employees to return to work. Its prior offer was not unconditional since it contained the condition that the employees return to work during a 60-day extension of the parties' expired contract. On June 21, the Respondent timely responded to the offer, stating that it had received it on June 19. The Respondent rejected the offer based upon, inter alia, the "distance" between the parties' positions, but welcomed further negotiations.

It is clear, as testified by Geib, that the lockout was lawfully intended to achieve the Respondent's economic goals in support of its bargaining position. The lockout was announced in a timely manner in response to the unconditional offer to return so that the strikers could "knowingly reevaluate their position and decide whether to accept the employer's terms and end the strike or to take other appropriate action." *Eads Transfer*, 304 NLRB 711, 712 (1991).

I accordingly find and conclude that the employees have not engaged in an unfair labor strike and that the Respondent has not violated the Act by locking them out.

Conclusions of Law

1. Flowserve Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. United Steelworkers of America, Local 9404, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act in any manner, as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The complaint is dismissed.

Dated, Washington, D.C.

Steven Davis
Administrative Law Judge

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.